

## EDUCATIONAL ADVISORY

### The Telephone Consumer Protection Act (TCPA): Primer on the Evolution of the FCC's TCPA Rules

*The Federal Communications Commission ("FCC") is empowered to issue rules and regulations implementing the Telephone Consumer Protection Act ("TCPA"). Among other things, the TCPA allows individuals to file lawsuits and collect damages for receiving unsolicited telemarketing calls, faxes, pre-recorded calls or autodialed calls. Courts have also interpreted the TCPA to cover SMS/Text Messaging.*

*The purpose of this Educational Advisory is to share our firm's collective experience in the area of TCPA compliance to ensure our clients are aware of the laws & regulations governing their marketing efforts that may implicate the TCPA.*

*We hope you find the following information both useful and informative.*

#### Introduction to The TCPA

The U.S. Congress passed the Telephone Consumer Protection Act ("TCPA") in 1991.<sup>1</sup> The purpose of the TCPA was to "protect residential telephone subscriber privacy rights by restricting certain commercial solicitation and advertising uses of the telephone and related telecommunications equipment."<sup>2</sup> Specifically, the TCPA made it unlawful to use "the telephone, or automatic dialing recorded . . . systems, to solicit individuals who have objected to receiving commercial telephone solicitations" in addition to the "use of facsimile machines, computers or other electronic devices to send unsolicited advertisements."<sup>3</sup> The TCPA applies to both voice calls and text messages sent via Short Message Service ("SMS").<sup>4</sup>

The TCPA authorizes the Federal Communications Commission (the "FCC" or "Commission") to implement regulations to carry out the provisions of the act.<sup>5</sup> The regulations related to the TCPA are found in Sections 64.1200-1202 of the Commission's rules.<sup>6</sup> The Commission first adopted rules

<sup>1</sup> PUB. L. No. 102-243, 105 Stat. 2394 (1991) (codified as 47 U.S.C. § 227 (2006)).

<sup>2</sup> H.R. REP. 102-317, 5-6.

<sup>3</sup> *Id.*

<sup>4</sup> The FCC extended the TCPA to include SMS text messaging in 2003. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14115, ¶ 165 (2003) ("2003 TCPA Order").

<sup>5</sup> *See* 47 U.S.C. § 227(b)(2) *et seq.* The TCPA also includes a private right of action provision to redress violations in state courts. *See* § 227(b)(3).

<sup>6</sup> 47 C.F.R. §§ 64.1200-1202.

to implement the TCPA in September 1992.<sup>7</sup> In that *Report and Order*, the Commission stated that the primary purpose of its TCPA regulations was to protect *residential* consumers from unwanted and harassing telemarketers.<sup>8</sup>

In 2012, the Commission adopted significant revisions to its TCPA regulations.<sup>9</sup> In that order, the FCC updated its rules to require telemarketers to: (1) obtain prior express written consent from consumers before “robocalling” them; (2) no longer use an “established business relationship” to avoid obtaining express written consent from consumers; and (3) provide consumers an automated, interactive “opt-out” mechanism during each “robocall.”<sup>10</sup> These new provisions went into effect on October 16, 2013. Since 2012, the scope of the new regulations has been clarified through several FCC declaratory rulings, as well as through several federal appellate court rulings.

This Educational Advisory will summarize the evolution of TCPA regulations but focus on the current impact of the *2012 TCPA Order* on telemarketers and other businesses. Section I summarizes the requirements for telemarketers and other businesses under the TCPA. Section II discusses the Do-Not-Call Registry. Section III discusses the recent explosion of class action lawsuits as enabled by the private right of action provision in the TCPA. Section IV examines the available defenses for TCPA violations for telemarketers and other businesses alleged to have violated the TCPA. Finally, Section IV discusses the important prior express consent provision, as implemented by the FCC in rulemaking.

## I. TCPA Requirements

Generally, the TCPA both prohibits and requires telemarketers and other businesses to do or not do certain things vis-à-vis consumers. For example, telemarketers are prohibited from:

- Calling residences outside the hours of 8:00 a.m. to 9:00 p.m., or to any telephone number on the national Do Not Call List without the prior express consent of the called party;<sup>11</sup>
- Using artificial or prerecorded voice recordings in calls to emergency lines, hospitals, doctor’s offices, cellular telephones, or any service for which the consumer-recipient is charged for the call;<sup>12</sup>
- Initiating a telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party;<sup>13</sup> and
- Unsolicited advertising faxes<sup>14</sup> and SMS text messages.<sup>15</sup>

<sup>7</sup> See generally *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CC Docket No. 92-90, FCC 92-443 (rel. Oct. 16, 1992) (“*1992 TCPA Order*”).

<sup>8</sup> *Id.* at ¶¶ 1-5.

<sup>9</sup> See generally *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CC Docket No. 02-278, FCC 12-21 (rel. Feb. 15, 2012) (“*2012 TCPA Order*”).

<sup>10</sup> *Id.* at ¶ 2.

<sup>11</sup> See 47 C.F.R. § 64.1200 (c)(1)-(2).

<sup>12</sup> See 47 U.S.C. § 227 (1)(b)(1)(A)(i)-(iii); 47 C.F.R. § 64.1200 (a)(1)(i)-(iv).

<sup>13</sup> See 47 U.S.C. § 227 (1)(b)(1)(B); 47 C.F.R. § 64.1200 (a)(3)(i)-(v).

However, telemarketers and other such callers are required to:

- Maintain a "do-not-call" list of consumers and/ or comply with the National Do Not Call Registry;<sup>16</sup>
- Provide the name of the person or entity on whose behalf the call is being made, and a telephone number or address;<sup>17</sup> and
- Provide the consumer called with the ability to opt out of future calls.<sup>18</sup>

## II. The Do-Not-Call Registry

In addition to creating restrictions on the method and type of telemarketing calls, the TCPA authorized a "Do-Not-Call Registry" by which consumers could register their telephone numbers with a national database in order to prevent unwanted calls. Initially in the *1992 TCPA Order*, the Commission established telemarketer-specific "do-not-call" requirements, where each telemarketer maintained a list of residential consumers who requested not to be called by that telemarketer.<sup>19</sup> However, due to consumer dissatisfaction with the 1992 framework, in 2003 the Commission established a uniform, national do-not-call registry.<sup>20</sup>

The Commission further prohibited telemarketers from contacting a consumer whose telephone number appears on the list (either residential or mobile phone number),<sup>21</sup> unless such a call is subject to a recognized exemption.<sup>22</sup> For example, the new registry did not apply to calls: (1) from organizations with which consumers have an established business relationship; (2) for which consumers have given prior written consent; (3) which are not commercial, or do not include unsolicited advertisements; and (4) by or on behalf of tax-exempt non-profit organizations.<sup>23</sup> The Federal Trade Commission ("FTC") currently administers the Do-Not-Call Registry.<sup>24</sup>

---

<sup>14</sup> See 47 U.S.C. § 227 (1)(b)(1)(C); 47 C.F.R. § 64.1200 (a)(4)(i)-(ii).

<sup>15</sup> For purposes of the TCPA, the FCC has interpreted "calls" to include SMS text messages. See *2003 TCPA Order* at ¶ 16 (2003).

<sup>16</sup> 47 C.F.R. §§ 64.1200 (c)(1)-(2), (c)(2)(i)(D).

<sup>17</sup> *Id.* at § 64.1200 (b)(1)-(2).

<sup>18</sup> *Id.* at § 64.1200 (a)(7)(i)(A)-(B).

<sup>19</sup> *1992 TCPA Order* at ¶¶ 23-24.

<sup>20</sup> *2003 TCPA Order* at ¶¶ 1-3. See also 47 C.F.R. § 64.1200(c)(2), (f)(9).

<sup>21</sup> *2003 TCPA Order* at ¶¶ 1-3.

<sup>22</sup> *Id.* at ¶¶ 42-54.

<sup>23</sup> *Id.*

<sup>24</sup> See *Consumer Information: National Do Not Call Registry*, FTC.GOV (last visited May 13, 2014), <https://www.consumer.ftc.gov/articles/0108-national-do-not-call-registry>.

### III. TCPA Private Right of Actions

Originally, the TCPA was perceived to be enforceable through small claims actions by individual consumer-plaintiffs.<sup>25</sup> However, over time, courts permitted the plaintiff's bar to initiate large class action lawsuits against TCPA violators by interpreting the TCPA's protections broadly.<sup>26</sup> In fact, between 2012 and 2013, there was a 54% increase in the number of TCPA class action lawsuits.<sup>27</sup>

Sections 227(c)(3) and (c)(5) of the TCPA provide individual consumers with a private right of action for violations of the TCPA by telemarketers. Plaintiff-consumers can receive damages in the amount of \$500 per violation (*i.e.*, per call, text message, or fax).<sup>28</sup> Furthermore, courts may award treble damages at their discretion.<sup>29</sup> Courts have the discretion to treble damages if a violation of the Act is "willful and knowing."<sup>30</sup> This means that each \$500 violation could be increased to \$1,500 in the court's discretion.<sup>31</sup> What constitutes a "willful and knowing" violation of the TCPA depends on the court in which the action is filed. Some courts hold that a defendant must *know* that its actions violate the TCPA.<sup>32</sup> Other courts hold that a plaintiff need only show that the defendant *willfully* or *knowingly* sent the unsolicited fax, or made the prerecorded call, concluding that *actual* knowledge of the law is unnecessary.<sup>33</sup>

Since damages are assessed on a per-transmission basis (*i.e.*, per call, text message, or fax), they can potentially amount to large liabilities for the defendant-telemarketer in the millions of dollars. Settlements in these suits can be in the millions of dollars. For example: at least \$500,000 for 1,000 calls, or at least \$5 million for 10,000 calls.<sup>34</sup> Most recent suits arise out of the

---

<sup>25</sup> James G. Snell and Carlos P. Mino, *Telephone Consumer Protection Act Cases Are on the Rise*, BNA (Feb. 14, 2013), <http://www.bna.com/telephone-consumer-protection-act-cases-are-on-the-rise/>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Federal Court's Certification of TCPA Class for Alleged Text Message Spam May Result in Numerous Copycat Class Actions*, KLEIN MOYNIHAN TURCO LLP (Feb. 2013), <http://www.kleinmoynihan.com/blog/federal-courts-recent-certification-of-tcpa-class-for-alleged-text-message-spam-likely-to-result-in-numerous-copycat-class-actions/>.

<sup>30</sup> Joshua Threadcraft, *The TCPA- Recoverable Damages*, JDSUPRA BUSINESS ADVISOR (Sept. 9, 2012), <http://www.jdsupra.com/legalnews/the-tcpa-recoverable-damages-35952/>.

<sup>31</sup> *Id.*

<sup>32</sup> *See Stewart v. Regent Asset Management Solutions, Inc.*, Civil Action File No. 1:10-CV-2552-CC-JFK, 2011 WL 1766018 at \*7 (N.D. GA May 4, 2011).

<sup>33</sup> *See Charvat v. Ryan*, 116 Ohio St. 3d 394, 401-02 (Ohio Sup. Ct. 2007).

<sup>34</sup> Shannon S. Petersen & Adrienne Lee, *United States: New FCC Interpretation Of "Express Consent" To Increase TCPA Class Action Liability*, MONDAQ (Nov. 3, 2013), <http://www.mondaq.com/unitedstates/x/272692/Consumer+Law/New+FCC+Interpretation+Of+Express+Consent+To+Increase+TCPA+Class+Action+Liability>.

prohibitions of Section 227(b)(1), in particular subsections (A), (B) and (C).<sup>35</sup> These provisions relate to calls or transmissions made using an ATDS.<sup>36</sup> Below is a list of recent TCPA Class Action Settlements:

- *In re Jiffy Lube International Text Spam Litigation*: Preliminary settlement valued at \$46.8 million (value of services) or \$35.1 million (cash value) for unsolicited text messages from a large Jiffy Lube franchisor to 2.3 million former customers.<sup>37</sup>
- *Arthur v. Sallie Mae*: \$24.1 million settlement based on auto-dialed debt collection calls to cell phones not listed on loan application.<sup>38</sup>
- *Pimental v. Google Inc.*: Preliminary \$6 million settlement for unsolicited text messages (including after opting out).<sup>39</sup>
- *Kazemi v. Payless Shoesource, Inc.*: \$6.25 million settlement for national text-message campaign.<sup>40</sup>

The recent rise in TCPA lawsuits should put telemarketers and other potentially liable companies on notice. The rise in such lawsuits can be explained by four factors: (1) modern technology allows for companies to reach large amounts of consumers in short periods of time; (2) a lack of a statutory cap on damages; (3) liberal enforcement by the courts; and (4) the FCC's failure to provide clear, unambiguous interpretation of the statute to fit modern technological trends.<sup>41</sup> For these reasons, plaintiffs' attorneys currently perceive TCPA lawsuits as a veritable litigation bonanza with no signs of stopping.<sup>42</sup> However, there are several "defenses" recognized by statute and the courts that allow defendants to mitigate the potential losses caused by TCPA class action lawsuits.

---

<sup>35</sup> James G. Snell and Carlos P. Mino, *Telephone Consumer Protection Act Cases Are on the Rise*, BNA (Feb. 14, 2013), <http://www.bna.com/telephone-consumer-protection-act-cases-are-on-the-rise/>.

<sup>36</sup> *Id.*

<sup>37</sup> *See generally* *In re Jiffy Lube International Text Spam Litigation*, 847 F.Supp.2d 1253 (S.D. Cal. 2012).

<sup>38</sup> *See generally* *Arthur v. Sallie Mae*, No. 10-cv-00198-JLR, 2012 WL 4075238 (W.D. Wash. Sept. 17, 2012).

<sup>39</sup> *See generally* *Pimental v. Google Inc.*, No. C-11-02585-YGR, 2012 WL 691784 (N.D. Cal. Mar. 2, 2012).

<sup>40</sup> *See generally* *Kazemi v. Payless Shoesource, Inc.*, No. C 09-5142 MHP, 2010 WL 963225 (N.D. Cal. Mar. 16, 2010).

<sup>41</sup> Monica Desai et al., *A TCPA for The 21<sup>st</sup> Century: Why TCPA Lawsuits Are on The Rise and What The FCC Should Do About It*, 8 Int'l J. of Mobile Marketing 1, 75 (2013).

<sup>42</sup> *See id.*

#### IV. Defenses

Under the TCPA, defendant-telemarketers are strictly liable for violations.<sup>43</sup> Thus, a telemarketer's lack of knowledge or intent to violate the TCPA is *not* a defense.<sup>44</sup> However, defendants can avoid liability for do-not call violations if it "has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations."<sup>45</sup> Furthermore, defendant-telemarketers still may not be liable in TCPA private right of actions for four reasons: (1) evidence of the prior express consent of the consumer-plaintiff; (2) limited availability for vicarious liability; (3) narrowness of the ATDS definition; and (4) class certification challenges. These "defenses" are discussed in turn below.

##### (1) Prior Express Consent:

The "prior express consent" provisions are provided in the TCPA at Sections 227(b)(1)(A) and (b)(1)(B). Section 227(b)(1)(B) of the TCPA makes it unlawful "to place a non-emergency telephone call to a residential line 'using an artificial or prerecorded voice' without the recipient's 'prior express consent' unless the call is 'exempted by rule or order of the Commission under paragraph (2)(B).'"<sup>46</sup> However, Section 227(b)(1)(A) "prohibits certain additional categories of *automated calls* absent an emergency or the 'prior express consent' of the called party."<sup>47</sup> The TCPA defines "automated calls," or "automatic telephone dialing systems " as "equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."<sup>48</sup> The TCPA permits the Commission to exempt from these bans a limited number of calls.<sup>49</sup> However, the scope of these exemptions has been vastly curtailed by the *2012 TCPA Order*, as well as subsequent FCC declaratory rulings and court opinions.

---

<sup>43</sup> Henry Pietrkowski et al., *The Telephone Consumer Protection Act: Recent Developments in Litigation, Regulation and Insurance Coverage*, REED SMITH (June 13, 2013), [http://www.reedsmith.com/files/Event/168b9703-7b3d-4d08-b760-a1c4a7def4a0/Presentation/EventAttachment/ec884627-e76a-46e9-a8d9-420efd291f56/TCPA Teleseminar Presentation - June 2013.pdf](http://www.reedsmith.com/files/Event/168b9703-7b3d-4d08-b760-a1c4a7def4a0/Presentation/EventAttachment/ec884627-e76a-46e9-a8d9-420efd291f56/TCPA%20Teleseminar%20Presentation%20-%20June%202013.pdf).

<sup>44</sup> *Id.*

<sup>45</sup> 47 U.S.C. § 227 (c)(5).

<sup>46</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Notice of Proposed Rulemaking, FCC 10-18, at ¶ 6 (rel. Jan. 22, 2010) (citing 47 U.S.C. § 227 (b)(1)(B)) (emphasis added). *See also* 47 C.F.R. § 64.1200 (a)(2).

<sup>47</sup> *Id.* at ¶ 7 (citing 47 U.S.C. § 227 (b)(1)(A)) (emphasis added). *See also* 47 C.F.R. § 64.1200 (a)(1).

<sup>48</sup> 47 U.S.C. § 227 (a)(1).

<sup>49</sup> *See id.* at §§ 227 (b)(2)(B), (C).

The evolution and scope of the prior express consent provision is discussed in greater detail in Section V of this Memorandum.

(2) Limited Availability for Vicarious Liability:

Although some plaintiffs have claimed that defendants are strictly liable for Sections 227(b) and (c) violations committed by third parties that make calls or send faxes on the companies' behalf (e.g., third-party marketers or debt collectors)<sup>50</sup>, in May 2013, the FCC issued a declaratory ruling holding that federal common law principles govern the application of vicarious liability in TCPA lawsuits.<sup>51</sup> In its ruling, the Commission held that companies using third-party telemarketers are not strictly liable for the third parties' TCPA violations.<sup>52</sup> Instead, a company's vicarious liability is assessed under "federal common law principles of agency."<sup>53</sup> According to the Commission, defendants could be liable if the defendant provided the third party access to information normally in the seller's exclusive control, or if the defendant gave the third party the ability to enter consumer information directly into the seller's internal tracking systems.<sup>54</sup> However, the Commission did not consider whether Section 227 provides for a single standard of vicarious liability, and left open the question whether Section 227(c)(5) allows for a broader standard of liability for do-not-call violations for another day.<sup>55</sup>

<sup>50</sup> See, e.g., *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 459 (6th Cir. 2010); *United States v. DISH Network, L.L.C.*, No. 09-3073, 2011 WL 475067 at \*1 (C.D. Ill. Feb. 4, 2011).

<sup>51</sup> Howard W. Waltzman et al., *FCC Addresses Vicarious-Liability Standards under Telephone Consumer Protection Act*, MAYER BROWN (May 21, 2013), <http://www.mayerbrown.com/FCC-Addresses-Vicarious-Liability-Standards-under-Telephone-Consumer-Protection-Act-05-21-2013/>.

<sup>52</sup> *In the Matter of The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, The Petition Filed by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, The Petition Filed by DISH Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, CG Docket No. 11-50, Declaratory Ruling, FCC 13-54, at ¶¶ 1, 29-47 (2013) [Hereinafter "*DISH Network Declaratory Ruling*"]. On January 22, 2014, the D.C. Circuit dismissed DISH Network's petition for review of the declaratory ruling on the grounds that the Commission's ruling was unreviewable, as it was not considered a "final agency order" by the court. See *Dish Network, L.L.C. v. FCC*, No. 13-1182, 2014 WL 323660 at \*1 (D.C. Cir. Jan. 22, 2014).

<sup>53</sup> *DISH Network Declaratory Ruling* at ¶¶ 1, 29-47.

<sup>54</sup> See Mark Brennan, *D.C. Circuit Opens the Door to New TCPA Defense Arguments on Liability and Deference to FCC*, HOGAN LOVELLS: FOCUS ON REGULATION (Jan. 28, 2014), <http://www.hlregulation.com/2014/01/28/d-c-circuit-opens-the-door-to-new-tcpa-defense-arguments-on-liability-and-deference-to-fcc/>.

<sup>55</sup> See *DISH Network Declaratory Ruling* at ¶ 32 ("[W]e do not find that the statute necessarily provides for a single standard of third-party liability for prerecorded call violations and do-not-call violations. Instead, we leave open the possibility that we could interpret section 227(c) to provide a broader standard of vicarious liability for do-not-call violations. We simply observe that, in light of our current rules, which do treat these provisions analogously, we could not come to such a conclusion in a declaratory ruling proceeding, but only after notice and comment rulemaking. Thus, it may well be that the Commission could ultimately decide that "on behalf of" liability goes beyond

(3) ATDS Definition:

The TCPA defines an “automatic telephone dialing system” (“ATDS”) as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”<sup>56</sup> Some courts have narrowly construed the ATDS definition in Section 227 (a)(1) to the point that the defendant is able to avoid liability for a TCPA violation when using ATDS in certain ways.<sup>57</sup> For example, in *Stockwell v. Credit Management, L.P.*, a California state court granted partial summary judgment to the defendant on the grounds that the use of a number generator is a requirement for the equipment to be considered ATDS under Section 227 (a)(1).<sup>58</sup> The definition of ATDS was similarly narrowly construed in *Hunt v. 21<sup>st</sup> Mortgage Corporation* where the Northern District of Alabama concluded that only the present capability of the equipment at issue is relevant.<sup>59</sup> Furthermore, the court stated that it would not consider the equipment’s potential capabilities caused by modification or alternation for purposes of the ATDS definition.<sup>60</sup>

However, some courts have construed the ATDS definition broadly. In *Brown v. Enterprise Recovery Systems Inc.*, the Texas Court of Appeals stated that the inherent capability of the equipment at issue to randomly generate calls rendered the technology an ATDS, regardless of whether the capability was actually or presently employed.<sup>61</sup> Also, in *Fields v. Mobile Messengers America Inc.*, the Northern District of California held that equipment with the simple capacity to dial numbers without any human intervention constituted an ATDS.<sup>62</sup>

Thus, it appears in certain circumstances, and in certain courts, that defendants to a TCPA claim may be able to construe the equipment at issue as being non-ATDS in order to avoid liability.

---

agency principles.”). *See also* Howard W. Waltzman et al., *FCC Addresses Vicarious-Liability Standards under Telephone Consumer Protection Act*, MAYER BROWN (May 21, 2013), <http://www.mayerbrown.com/FCC-Addresses-Vicarious-Liability-Standards-under-Telephone-Consumer-Protection-Act-05-21-2013/>.

<sup>56</sup> 47 U.S.C. § 227 (a)(1)(A), (B).

<sup>57</sup> Kelley C. Barnaby and David Carpenter, *Defense Perspective On Major TCPA Developments In 2013*, LAW360 (Jan. 14, 2014), <http://www.law360.com/articles/499491/defense-perspective-on-major-tcpa-developments-in-2013>.

<sup>58</sup> *Stockwell v. Credit Management, L.P.*, Case No. 30-2012-00596110-CU-NP-CXC at 1-2 (Sup. Ct. Cal. Oct. 2, 2013).

<sup>59</sup> *Hunt v. 21<sup>st</sup> Mortgage Corporation*, No. 2:12–CV-2697-WMA, at 9-10 (N.D. Al. Sept. 17, 2013).

<sup>60</sup> *Id.*

<sup>61</sup> *Brown v. Enterprise Recovery Systems Inc.*, No. 02-11-00436-CV, at 20 (Court of Appeals 2<sup>nd</sup> Dist. Tex. Aug. 22, 2013).

<sup>62</sup> *Fields v. Mobile Messengers of America, Inc.*, No. C 12–05160 WHA, 2013 WL 6073426 \*3-4 (N.D. Cal. Nov. 18, 2013).

(4) Class Certification Challenges:

In some circumstances, defendants may be able to defeat TCPA class action lawsuits in federal court by raising issues with class certification. Rule 23(a) of the Federal Rules of Civil Procedure requires that as a prerequisite to certification, class action plaintiffs must demonstrate: (1) *Numerosity* - the class is so numerous that joinder of all members is impracticable; (2) *Commonality* - there are questions of law or fact common to the class; (3) *Predominance/ Typicality* - the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) *Adequate Representation* - the representative parties will fairly and adequately protect the interests of the class.<sup>63</sup>

In several cases, defendants have been able to challenge class certification through a successful showing that the need for separate inquiries into each class member's individualized consent to receive calls demonstrated a lack of commonality and predominance of common questions of law or fact among class members.<sup>64</sup> For example, in *Connelly v. Hilton Grand Vacations Co., LLC*, the Southern District Court of California agreed with the defendants that the plaintiffs failed to "advance a viable theory employing generalized proof to establish liability with respect to the class involved."<sup>65</sup> The court agreed with the defendants that the class members' "sufficiently varied" experiences in contacting Hilton "provide[d] dissimilar . . . expressions of consent"<sup>66</sup>, noting that "[t]his diversity suggests consent should be evaluated individually" on a per class member basis.<sup>67</sup> Other federal courts have reached the same conclusion that where the class members' consent is at issue in a TCPA class action, it is difficult to demonstrate that Rule 23(a)'s predominance and commonality requirements have been established.<sup>68</sup>

<sup>63</sup> See FRCP 23(a) (2012).

<sup>64</sup> See TCPA Blog, *TCPA Class Certification Denied — Necessity of Individualized Consent Inquiries Doom Certification of TCPA Class Actions*, DRINKER BIDDLE (Nov. 11, 2013), <http://www.drinkerbiddle.com/resources/publications/2013/TCPA-Class-Certification-Denied>.

<sup>65</sup> Case No. 12CV599 JLS (MDD), 2013 WL 5835414 at \*2 (S.D. Cal. Oct. 29, 2013).

<sup>66</sup> *Id.* at \*3.

<sup>67</sup> *Id.* at \*4.

<sup>68</sup> See TCPA Blog, *TCPA Class Certification Denied — Necessity of Individualized Consent Inquiries Doom Certification of TCPA Class Actions*, DRINKER BIDDLE (Nov. 11, 2013), <http://www.drinkerbiddle.com/resources/publications/2013/TCPA-Class-Certification-Denied>. See, e.g., *Gannon v. Network Tel. Servs., Inc.*, Case No. 12-9777, 2013 WL 2450199 (C.D. Cal. June 5, 2013) (denying certification because issue of consent demanded individual inquiry into each potential member's consent and court "would have to hold 'mini-trials' to determine who received unauthorized text messages"); *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 106-07 (N.D. Ill. 2013) ("[I]ssues of individualized consent predominate when a defendant sets forth specific evidence showing that a significant percentage of the putative class consented to receiving calls on their cellphone. . . . [Because] the Court would have to conduct a series of mini-trials to determine the population of the class and to determine liability[,] . . . individual issues predominate over common ones.") *reconsideration denied*, No. 12 C 4415, 2013 WL 3872171 (N.D. Ill. July 29, 2013); *G.M. Sign, Inc. v. Brink's Mfg. Co.*, 09 C 5528, 2011 WL 248511, at \*9 (N.D. Ill. Jan. 25, 2011) (denying class certification because determining class membership would require "a series of mini-trials"); *Hicks v. Client Servs., Inc.*, 07-61822-CIV, 2008 WL 5479111, at \*8 (S.D. Fla. Dec. 11,

However, in *Meyer v. Portfolio Recovery Associates, LLC*, the Ninth Circuit held that determining that individualized issues of consent did not preclude finding of commonality or typicality.<sup>69</sup> The court refused to agree with the defendant that individualized issues of consent were at issue because according to the court the defendant “did not show a single instance where express consent was given before the call was placed.”<sup>70</sup>

Thus, it appears that as long as the defendant is able to provide evidence that there are individualized questions of consent, the defendant will probably be successful in defeating class certification in a TCPA class action lawsuit.

## V. Prior Express Consent

### i. The Evolution of the TCPA Consent Requirement

Through the *1992 TCPA Order*, the FCC prohibited: (1) autodialed calls and non-emergency and/or non-consensual artificial or prerecorded voice messages made to emergency lines, health care facilities, wireless phone numbers, or any consumer-charged number; and (2) prerecorded voice message calls to residences.<sup>71</sup> However, the FCC exempted from this prohibition calls made by telemarketers to residential consumers where there existed a prior business relationship between the caller and the consumer, or in the event of an emergency.<sup>72</sup> Later in 1995, the Commission clarified that this “prior express consent” exemption required the consumer to: (1) clearly state that the telemarketer may call the consumer; and (2) clearly express an understanding that the telemarketer’s subsequent call will be made for the purpose of encouraging a commercial exchange.<sup>73</sup>

Depending on the status of the consumer’s telephone number, consent may be obtained by the telemarketer either *in writing* or *orally*. In 2005, Commission clarified that the consent must be *in writing* the subscriber’s number is listed on the national Do-Not-Call Registry.<sup>74</sup> However, consent

---

2008) (denying class certification in TCPA action because “ultimately [issue of] consent . . . would have to be determined on an individual basis at trial”); *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995) (denying class certification where “[d]etermining a membership in the class would essentially require a mini-hearing on the merits of each case”).

<sup>69</sup> 707 F.3d 1036, 1041-42 (9th Cir. 2012).

<sup>70</sup> *Id.*

<sup>71</sup> *1992 TCPA Order* at ¶ 5.

<sup>72</sup> *Id.* See also 47 U.S.C. § 227 (b)(1)(B). 47 U.S.C. § 227 (b)(1)(A) prohibits the non-emergency use of automatic telephone dialing systems or artificial or prerecorded messages, without the “prior express consent” of the called party when calling: emergency telephone lines, health care facilities, telephone numbers assigned to wireless services, and services for which the called party is charged for the call.

<sup>73</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12396, ¶ 11. (1995).

<sup>74</sup> See *Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Second Order on Reconsideration, 20 FCC Rcd 3788, 3804, ¶ 40 (2005).

may be obtained both *orally* or *in writing* if the subscriber's number is not listed on the registry.<sup>75</sup> The Commission explained that the basis for their distinction was that since consumers who placed their residential telephone numbers on the Do-Not-Call Registry indicated their desire not to be contacted by consumers, explicit and unambiguous consent was necessary to overcome their established wish *not* to be contacted by specific telemarketers.<sup>76</sup>

In 2003, the Commission stated that telemarketers must obtain consent as evidenced by a signed, written agreement between the consumer and telemarketer.<sup>77</sup> This agreement must explicitly state that the consumer agrees to be contacted at a specific telephone number provided by the consumer.<sup>78</sup> Furthermore, the Commission stated that such a signature may be in either original or electronic/ digital form if permissible under the applicable state or federal law.<sup>79</sup>

In tandem with the consent requirement, the *1992 TCPA Order* also included an opt-out mechanism for consumers. The order required telemarketers to allow any contacted consumer to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.<sup>80</sup> To enable such mechanism, the *1992 TCPA Order* required telemarketers to state during a pre-recorded phone message either: (1) the identity of the business, individual, or other entity initiating the call at the beginning of the message; or (2) the telephone number or address of such calling business, other entity or individual during or after the message.<sup>81</sup>

## ii. The 2012 TCPA Order

The purpose of the *2012 TCPA Order* was to increase consumer protection from "unwanted autodialed or prerecorded telemarketing calls," and to "maximize consistency with the Federal Trade Commission's (FTC) analogous Telemarketing Sales Rule (TSR), as contemplated by the Do-Not-Call Implementation Act (DNCIA)."<sup>82</sup> The Commission did so by tightening the prior express consent requirement, and eliminating the previous business relationship exemption.<sup>83</sup>

In the *2012 TCPA Order*, the Commission narrowed prior consent under the TCPA to: (1) an agreement; (2) in writing; which included (3) the signature of the person called (*i.e.*, the consumer).<sup>84</sup> The Commission ruled that the agreement must clearly stipulate: (1) the telemarketing messages involved; (2) that the messages are to be made using an automatic telephone dialing system/ artificial pre-recorded voice system; (3) the specific telephone number to which the consumer authorizes those messages to be delivered; and (4) that the consumer is not

---

<sup>75</sup> *Id.*

<sup>76</sup> *2003 TCPA Order* at ¶ 44.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *1992 TCPA Order*, 7 FCC Rcd at 8779, ¶ 53; *see also* 47 C.F.R. § 64.1200(b).

<sup>81</sup> *1992 TCPA Order*, 7 FCC Rcd at 8779, ¶ 53; *see also* 47 C.F.R. § 64.1200(b).

<sup>82</sup> *2012 TCPA Order* at ¶ 1.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at ¶ 2.

required to make such an agreement as a condition of purchasing goods or services.<sup>85</sup> Moreover, the elimination of the prior business relationship exemption through the *2012 TCPA Order* effectively limited telemarketers to garnering consent via a written agreement for autodialed calls.<sup>86</sup> However, such calls, once consented to by consumers, still must include an interactive opt-out mechanism at the beginning and during the call.<sup>87</sup> The order's provisions are effective as of October 16, 2013.<sup>88</sup>

### iii. Recent Declaratory Rulings Concerning the *2012 TCPA Order*

Earlier this year, the Commission issued two declaratory rulings clarifying the scope of the *2012 FCC Order*. These rulings are the *GroupMe Declaratory Ruling*<sup>89</sup>, and the *CAA Declaratory Ruling*<sup>90</sup> both dated March 27, 2014. Below is a summary of these rulings, and a discussion of their significance.

#### *GroupMe Declaratory Ruling*

In the *GroupMe Declaratory Ruling*, the Commission clarified that text-based social networks are permitted to send consumers administrative texts confirming a consumer's interest in joining social network groups without violating the TCPA.<sup>91</sup> Specifically, the FCC clarified that a social network administrator could obtain a consumer's prior express consent via an intermediary (e.g., group organizer of a group using the GroupMe's service).<sup>92</sup> The Commission explained, "When consumers give express consent to participate in the group, they are the types of expected and desired communications TCPA was not designed to prohibit."<sup>93</sup>

The Commission's ruling in GroupMe's petition applies beyond the scope of text-based social networks. The Commission stated that the TCPA to be ambiguous concerning how consent to auto-dialed, prerecorded calls/texts is obtained.<sup>94</sup> Thus, the *GroupMe Declaratory Ruling* signals that the Commission believes that it potentially has broad discretion in interpreting the TCPA's prior express

<sup>85</sup> *Id.* at ¶¶ 20-34.

<sup>86</sup> *Id.* at ¶¶ 35-43.

<sup>87</sup> *Id.* at ¶¶ 44-49.

<sup>88</sup> See David O. Klien, *New TCPA Rules Effective October 16, 2013*, KLEIN MOYNIHAN TURCO LLP (last visited May 28, 2014), <http://www.kleinmoynihahan.com/publication/new-tcpa-rules-effective-october-16-2013/>.

<sup>89</sup> See generally *GroupMe, Inc./ Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, FCC 14-33 (rel. Mar. 27, 2014) ("*GroupMe Declaratory Ruling*").

<sup>90</sup> See generally *Cargo Airline Association Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, FCC 14-33 (rel. Mar. 27, 2014) ("*CAA Declaratory Ruling*").

<sup>91</sup> *GroupMe Declaratory Ruling* at ¶ 1.

<sup>92</sup> *Id.* at ¶ 6.

<sup>93</sup> *Id.* at ¶ 1.

<sup>94</sup> Ronald G. London & Christin S. McMeley, *FCC Sends Its Own Message with TCPA Declaratory Rulings*, DAVIS WRIGHT TREMAINE LLP (Mar. 28, 2014), <http://www.dwt.com/FCC-Sends-Its-Own-Message-with-TCPA-Declaratory-Rulings-03-28-2014/>.

consent provision.<sup>95</sup> This perspective should lead to many more declaratory rulings by the FCC clarifying the scope of that provision that are pro-business in tone.<sup>96</sup>

#### *CAA Declaratory Ruling*

In the *CAA Declaratory Ruling*, the Commission granted package delivery companies the authority to “alert wireless consumers about their packages, as long as consumers are not charged and may easily opt out of future messages if they wish . . . .”<sup>97</sup> The ruling is significant as it is the first time the Commission exercised its statutory authority under 47 U.S.C. § 227(b)(2)(C) to exempt by “rule or order” autodialed calls “to a number assigned to a wireless service that are not charged to the consumer, subject to conditions the Commission may prescribe to protect consumers’ privacy rights.”<sup>98</sup> Also, the Commission stated that Congress did not intend the TCPA’s restrictions to hinder normal, expected, and desired business communications.<sup>99</sup> Such a conclusion may be indicative of the Commission’s future stance on the scope of the TCPA.

The *GroupMe* and *CAA* declaratory rulings could be indicative of a more pro-business perspective of the TCPA by the agency vis-à-vis the prior express consent requirement.<sup>100</sup> This could indicate the outcome of the Commission’s future declaratory rulings concerning the scope of the TCPA.<sup>101</sup>

#### **iv. Important Federal Court Rulings Related to Prior Express Consent**

Since 2012, several federal appellate courts have clarified the scope of the TCPA’s prior express consent provision. However, not all of these rulings directly interpret the *2012 TCPA Order*. Below is a summary of those rulings.

- *Soppet v. Enhanced Recovery Co.* (7th Circuit 2012): Subscribers, who were reassigned debtors’ cell phone numbers, sued a bill collector for violating the TCPA by making automated phone calls on behalf of creditor phone company to the subscribers.<sup>102</sup> These calls were intended for debtors who were not the subscribers.<sup>103</sup> The Seventh Circuit rejected the defendant’s argument that consent remained in place for those numbers despite the fact that the targeted debtors no longer used those phone numbers.<sup>104</sup> Instead, the court concluded that the “use of a single phrase consistently” (*i.e.*, the “called party”) in

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *CAA Declaratory Ruling* at ¶ 1.

<sup>98</sup> *Id.* at ¶ 2. See also Ronald G. London & Christin S. McMeley, *FCC Sends Its Own Message with TCPA Declaratory Rulings*, DAVIS WRIGHT TREMAINE LLP (Mar. 28, 2014), <http://www.dwt.com/FCC-Sends-Its-Own-Message-with-TCPA-Declaratory-Rulings-03-28-2014/>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 679 F.3d 637, 638-39 (7th Cir. 2012).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 639-40.

Section 227 “implies that the consent must come from the current subscriber.”<sup>105</sup> Thus, under the TCPA, the court concluded that the “called party” meant the person subscribing to the called number at the time the call was made – hence limiting the scope of valid consent to such individuals.<sup>106</sup>

- *Gager v. Dell Financial Services, LLC* (3rd Circuit 2013): Plaintiff sued Dell Financial Services alleging that the company violated Section 227(b)(1)(A)(iii) of the TCPA by using an ATDS to call her cell phone after she revoked her prior express consent to be contacted.<sup>107</sup> Dell contended that the principles of contract law precluded the plaintiff from revoking her prior express consent.<sup>108</sup> The Third Circuit rejected Dell’s argument, and concluded that under the TCPA, once a consumer’s prior express consent is obtained, it should not be considered irrevocable.<sup>109</sup> Instead, according to the court, the consumer may revoke their consent at any time.<sup>110</sup>
- *Osorio v. State Farm Bank, F.S.B.* (11th Circuit 2014): Housemate of credit card debtor sued housemate’s creditor, alleging violations of the TCPA, based upon autodialed debt collection calls made by creditor’s agent to housemate’s cell phone.<sup>111</sup> The Eleventh Circuit found that absent contractual restriction, both the debtor and housemate could *orally revoke* any consent given to creditor to call housemate’s cell phone number in connection with debtor’s credit card debt.<sup>112</sup>

These federal appellate opinions demonstrate that the FCC and the courts may be moving in different directions vis-à-vis the scope of valid prior express consent. While the Commission demonstrated in the *GroupMe* and *CAA* rulings that the agency is willing to take a more pro-business stance regarding actions leading to valid consent, the federal courts are taking a more pro-consumer stance – giving consumers the benefit of the doubt that consent was not explicitly provided to the caller. This tension should put telemarketers and other companies on notice that the rules and regulations concerning prior express consent are remain ambiguous, but are nevertheless rapidly evolving.

## Conclusion

The purpose of this Advisory is to provide a general overview of the TCPA, and discuss areas in which our clients may face liability for violations. The TCPA is a rapidly evolving area of law, and telemarketers and other businesses should pay attention to how such developments affect the

---

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> 727 F.3d 265, 267-68 (3d Cir. 2013).

<sup>108</sup> *Id.* at 273-74.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* See also Alerts: New TCPA Requirements for “Prior Express Written Consent” Effective October 16, PATTON BOGGS (Sept. 4, 2013), <http://www.pattonboggs.com/viewpoint/new-tcpa-requirements-for-prior-express-written-consent-effective-october-16>.

<sup>111</sup> 746 F.3d 1242, 1247-48 (11th Cir. 2014).

<sup>112</sup> *Id.* at 1255-56.

nature of their communications with their customers. If you have any questions regarding content discussed in this Advisory, or any other TCPA compliance issues, please do not hesitate to contact [The CommLaw Group](#) today.

**DISCLAIMERS: This Advisory has been prepared for informational purposes only. It is not for the purpose of providing legal advice and does not create an attorney-client relationship between Marshlian & Donahue, LLC and you. You should not act upon the information set forth herein without seeking experienced counsel. This Advisory may be considered Attorney Advertising in certain jurisdictions. The determination of the need for legal services and the choice of lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise.**